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Letter dated 13 June 1991 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General

I have the honour to enclose herewith a letter dated 12 June 1991 addressed to you by His Excellency Osman Ertuğ, Representative of the Turkish Republic of Northern Cyprus (see annex).

I should be grateful if the text of the present letter and its annex would be circulated as a document of the General Assembly, under agenda item 43, and of the Security Council.

(Signed) Mustafa AKSIN
Ambassador
Permanent Representative

Annex

Letter dated 12 June 1991 from Mr. Osman Ertuğ
to the Secretary-General

At a time when the search for a federal solution to the question of Cyprus is entering a decisive phase, my Government has sought the legal opinion of two eminent jurists, Professor E. Lauterpacht and Mr. Monroe Leigh, on the critical issue of the sovereignty of the component states of the future federal state, for the purpose of clarifying the legal issues involved.

I have the honour to enclose herewith the text of this legal opinion in the hope that it will facilitate your efforts in the search for a solution within the context of your good offices mission in Cyprus (see appendix).

I should be grateful if the present letter and its annex were circulated as a document of the General Assembly, under agenda item 43, and of the Security Council.

(Signed) Osman ERTUĞ
Representative of the
Turkish Republic of Northern Cyprus

APPENDIX

Turkish Republic of Northern Cyprus Opinion

1. We have been asked to advise on certain questions regarding sovereignty in Cyprus and its relationship to proposals for a solution of the Cyprus problem along federal lines.

1. SOVEREIGNTY

2. The UN Security Council, in Resolution 649 (1990) of 12 March 1990, paragraph 1, reaffirmed its support for the 1977 and 1979 high level agreements between the leaders of the Greek Cypriot and Turkish Cypriot Communities

> in which they pledged themselves to establish a bi-communal Federal Republic of Cyprus that will safeguard its independence, sovereignty, territorial integrity and non-alignment, and exclude union in whole or in part with any other country and any form of partition or secession.

Paragraph 3 of the same Resolution called upon the leaders of the two Communities

> to pursue their efforts to reach freely a mutually acceptable solution providing for the establishment of a federation that will be bi-communal as regards the constitutional aspects and bi-zonal as regards the territorial aspects....

It is understood that both Communities adhere to this Resolution as a bass for negotiation.

3. The political question is how to achieve a federal system of which the details are acceptable to both sides. That is not a matter for this Opinion. The legal question is that of identifying the legal quality of each of the two Communities in the negotiations and in relation to the conceptual starting point for the construction of an effective federal system. That is the question that will first be considered here.

4. The circumstances of the present situation indicate quite clearly that the correct legal basis on which the two sides must approach the negotiations is that of equality of status, and, in particular, the possession of sovereignty in equal degree over the matters that are at present within the control of each Community. For this purpose sovereignty means the possession and exercise of real authority on an organized, orderly and continuing basis by those whom the populations of each area treat as their governments. A federal arrangement is one which by its nature involves a bringing together of the sovereignties of the component parts in association with a constitutionally controlled distribution of the powers of government between the federal and the communal components.

5. The justification for the acknowledgement of the sovereignty of each of the two Communities in Cyprus lies in the historical background to, and facts of, the present situation. Prior to 1878 Cyprus was under the legal and actual sovereignty of Turkey. From 1878 to 1914, sovereignty, though nominally Turkish, was actually exercised by Britain. In 1914 Britain annexed the island and in 1923, by Article 20 of the Treaty of Lausanne, Turkey

recognized that annexation. On the basis Britain acquired nominal in addition to actual sovereignty and retained it until 1960. Then, in implementation of the internationally agreed settlement reached in that year, Britain formally relinquished sovereignty over the Island of Cyprus in order to permit the establishment of "an independent sovereign Republic of Cyprus".

6. The circumstances in which Britain relinquished its sovereignty over Cyprus in 1960 should be borne in mind. The British Government had previously explicitly recognized that there were two national communities sharing the island and that "any exercise of self-determination should be effected in such a manner that the Turkish Cypriot community, no less than the Greek Cypriot community, shall, in the special circumstances of Cyprus, be given freedom to decide for themselves their future status." 526 Parl. Deb., H.C. (5th ser.) 1267-68 (1956). Indeed, in order to preserve the rights of the Turkish Cypriot Community, the British Government stood ready to "include partition among the eventual options." Id.

7. Eventually, an international solution was developed between Britain, Greece, Turkey and representatives of the Greek Cypriot and Turkish Cypriot Communities. In the international agreements concluded, Britain effectively agreed to relinquish sovereignty over Cyprus in favor of the two communities in exchange for their commitment to form a single government along agreed constitutional lines. Greece and Turkey joined Britain in agreeing to guarantee the constitutional structure of the new Republic of Cyprus. Upon the signing of these international agreements and the passage of the Cyprus Act, sovereignty over Cyprus was in effect transferred from Britain to the Greek Cypriot and Turkish Cypriot Communities and through them to the Republic of Cyprus as constituted under the Constitution of 1960. The compelling evidence that the two Cypriot Communities were an essential link in conferring sovereignty on the Republic of Cyprus is provided by the fact that all the basic documents from 1959-1960 were signed or initialled by the representatives of the two Cypriot Communities on behalf of their respective Communities.

8. The Constitution of 1960 was totally and inseparably founded upon the existence and political partnership of the

Greek and Turkish Communities within Cyprus. They were treated as equal in every way except in size. Some constitutional consequences flowed from that disparity. In representative bodies (the Council of Ministers and the House of Representatives) numbers were distributed on a proportional basis; likewise in the Civil Service and the Armed Forces. Otherwise, in relation to most important posts, where the principal position was held by a member of one Community, the deputy position had to be held by a member of the other. In the Supreme Constitutional Court, however, the two Communities were equally represented. In other important operational aspects of the Constitution the political equality of the two Communities was also recognized. The leading article of the Constitution on the executive power (Article 46) declared that "the executive power is ensured by the President and the Vice-President of the Republic" and certain important powers were conferred upon the President and the Vice-President to be exercised "conjointly". Moreover, in the enumeration of such powers as might be exercised by each of these two principal officers separately, each of them was given the identical "right of final veto on decisions of the Council of Ministers concerning foreign affairs, defense or security".

9. In short, sovereignty devolved on Cyprus in 1960 through a joint exercise of self-determination by the two communities and reposed in them jointly. There was no basis on which it could be said that either of the two Communities was sovereign and the other was not or that one Community enjoyed sovereignty or legal control over the other.

10. This constitutional arrangement, aptly described as a "functional federation" of two distinct national and political communities that happened at that time to live interspersed, is not without parallel in international experience. In Belgium, for example, where the Flemish-speaking Community constitutes about 60% of the population and the French-speaking community about 40%, the Constitution stipulates that the cabinet must be equally divided among Flemish and French ministers and that certain laws cannot be passed without separate majority votes by each national group in each chamber of the legislature. See Articles 1, 38 bis and 86 bis of the Belgian Constitution. In addition, the Constitution guarantees to the Flemish, French, and German-speaking Communities the right to legislate separately on matters of personal status,

language, social life, and education. Article 59 bis, as amended in 1980 and 1988.

11. Beginning with the Greek Cypriot President's attempt in 1963 to amend the Constitution to eliminate the political equality of the Turkish Cypriot Community, the unity that should have marked the operation of the Constitution was broken. Upon the unilateral denunciation by the Greek Cypriot Community of the legal basis on which the joint exercise of sovereignty by the two communities in Cyprus was predicated, the Constitution of 1960 self-evidently ceased to be operative and the "Republic of Cyprus" as constituted by the two communities ceased to exist. From 1964 onwards the two communities developed increasingly separate political and economic administrations and settlements, a process which culminated in 1975 with the complete regrouping of the two Communities in Cyprus into two geographically and administratively separate areas, a situation which is reflected in the "Exchange of Populations Agreement" of 2 August 1975. This fundamental condition was recognized in 1974 by the Foreign Ministers of Britain, Greece and Turkey in their Geneva Declaration of 30 July in which they jointly called for "the reestablishment of

constitutional government in Cyprus" and "an immediate return to constitutional legitimacy." In doing so,

> The Ministers noted the existence in practice on the Republic of Cyprus of two autonomous administrations (-) that of the Greek Cypriot community and that of the Turkish Cypriot community.

12. The "Republic of Cyprus" being no longer constitutionally or factually able to exercise sovereignty over the whole island, sovereignty over the island was divided and thereafter reverted to the authority actually in control of each of the two territories: the Greek Cypriot Community in the south and the Turkish Cypriot Community in the north.

13. The fact that the Greek Cypriot Community in the south has continued to operate under the title "Republic of Cyprus" is no more than a matter of nomenclature; it does not and cannot accord the Greek Cypriot Community a sovereignty in the north which it does not have the power to exercise. Nor can any such sovereignty result from any

international recognition of the Greek Cypriot Community as the "Republic of Cyprus". Correspondingly, the presence of Turkish forces in the north does not deprive the Turkish Cypriot Community of the actual power and jurisdiction, amounting in effect to sovereignty, which it exercises, and has since 1974 continuously and without effective challenge exercised, there. The Government of Turkey recognizes the Turkish Cypriot Community in the north as the sovereign government of the area, does not claim for itself or exercise power in that area, and expressly denies that northern Cyprus is part of Turkey. The absence of general de Jure international recognition of the status of the Turkish Cypriot Community under the name of the Turkish Republic of Northern Cyprus cannot deprive that Community of the sovereignty which as an indisputable matter of fact, it exercises in Northern Cyprus - a situation that is reflected in the extensive de facto relations that foreign States maintain with that Community.

14. The reversion of sovereignty in Cyprus to the two communities is confirmed both by logic and by international experience. The experience of the Mali Federation is particularly instructive. In 1959, Senegal and Soudan were

semi-autonomous members of the French Community which agreed to seek independence and form a federation. Each colony negotiated individually with France for its independence and the eventual agreements on the transfer of sovereignty were signed by France, Senegal and Soudan; however, the formal proclamation of independence was issued by the federation of Mali. Thus, as in the case of Cyprus, the federation and its component entities achieved sovereignty at the same time.

15. In 1960 Senegal withdrew from the Mali Federation, on the grounds that breaches by Soudanese federal government officers of basic terms of the constitution had rendered the constitution legally worthless. By 1961, Soudan, (which changed its name to Mali) and Senegal held separate seats in the United Nations and had been recognized as independent states by France, the United States, and several other countries. Thus there is no international legal impediment to, and indeed there is precedent for, the community of nations to recognize the reversion of sovereignty to the Greek Cypriot and Turkish Cypriot Communities.

2. THE PROPOSALS OF THE TWO SIDES

16. The possession of sovereignty by each of the two Communities has a direct bearing on the manner in which the powers of the federal authority and of the two component federated States is approached. The current Greek Cypriot proposals contain a number of expressions suggestive of the view that the Constitution will allocate powers to the Communities rather than that the Communities will be delegating powers to the new constitutional authority. Thus, for example, under heading VI Constitutional Arrangements, in paragraph 1(a) (General), the Greek Cypriots propose that "the Republic will be Federally organized, with substantial powers being reserved to the constituents"; and paragraph 2(d) states that "there will be no possibility of Federal encroachment on the powers and functions of the Provinces. The latter will be constitutionally entrenched, the initial allocation (presumably to each Community) having been agreed by the two sides."

17. All the passages just emphasized reflect the view that the powers of government have some central (albeit innominate) source and are, therefore, the objects of grant

to the "Provinces". They may be compared with the approach to be found in the Turkish Cypriot proposals, e.g. those of 6-7 April 1989, which indicated, inter alia, that "residual powers will remain with the federated republics". The proposed Turkish Cypriot structure reflects the position which is most common in federal systems, namely, that powers flow from the constitutional components to the federal government and that the residue of unallocated powers remains in the constitutional components.

3. THE PREVALENT PRACTICE IN FEDERAL SYSTEMS

18. International law is, of course, not directly concerned with the distribution of power within a federal system, but it certainly does not contain any prohibition on the creation or recognition of federal states in which the residuum of power is in the constituent units. In this connection one may recall the position in a number of significant federal systems which are presented, simply for convenience, in alphabetical order.

(i) Argentina

The constitution of Argentina provides in Article 104 that "The Provinces retain all powers not delegated by the Constitution to the Federal Government and those expressly reserved by special covenants at the time of their incorporation."

(ii) Australia

The Commonwealth of Australia Constitution Act, section 107, preserves the legislative competence of State Parliaments in respect of any topic that is not exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State. Article 107 provides:

> Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the Case may be.

As stated in R. v. Phillips (1970) 125 CLR 93, "this is simply an expression of an element that is implicit in any federal system in which defined powers are granted to the central authority and the undefined residue remains with the constituent parts."

(iii) Austria

The Federal Constitution provides in Article 15 (1) that "Insofar as a matter is not expressly assigned by the Federal Constitution to the 'Bund' for legislation or also execution, it remains within the Lander's autonomous sphere of competence".

(iv) Brazil

The Federal Constitution of 1988, Article 25, provides: "States are organized and governed by the constitutions and the laws that they adopt, the principles of the Constitution being observed.

(I) Spheres of authority not forbidden to them by this Constitution are reserved to the States..."

(v) Federal Republic of Germany

Prior to unification, Article 30 of the Federal Constitution (Grundgesetz) provided (and still provides) that:

> The discharge of the State's duties and competences is within the domain of the Lander insofar as this Constitution does not allow or provide for a different regulation.

Article 79, paragraph 3, provides that any revision of the constitution which would touch upon the status of the Lander and their fundamental powers is prohibited. The German Federal Constitutional Court has stated that this guarantee protects the sovereignty of the Lander in a federal State are States in the legal sense only if they retain a nucleus of inherent competences of which they cannot be deprived". BVerfGE 34, 9(19f).

(vi) Malaysia

Schedule IX of the Federal Constitution contains lists of the exclusive powers of the Federal and State Governments respectively, as well as a Concurrent List. Article 77 of the Constitution provides that the residual power is retained by the States:

> The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.

(vii) Mexico

Article 24 of the Federal Constitution provides that, "those competences that are not expressly conceded by this Constitution to the federal authorities are understood to be retained by the States".

(viii) Nigeria

Under the Federal Constitution of 1929, Chapter 1, Section 4, competences not listed in the list of exclusive powers of the Federal Government or of the concurrent powers of the Federal Government and the States are allocated to the States.

(ix) Pakistan

The 1973 Constitution of Pakistan, Article 142, provides that the residuum of power is in the Provinces.

(x) Switzerland

The Swiss Confederation was founded as a voluntary association of independent cantons which agreed to surrender certain of their sovereign powers to a federal government. Accordingly, the Federal Constitution, Article 3, provides that: "The Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution, and, as such, they exercise all rights which are not delegated to the federal power".

(xii) USA

The United States Constitution of 1787 was a compact reached between thirteen independent states. Reflecting this voluntary creation of a federal government by sovereign entities, the Tenth Amendment to the U.S. Constitution provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

(xiii) USSR

The relationship between the Union Government and the individual Republics has been newly regulated by a law of 26 April 1990 which declares that the Republics have all the powers not expressly delegated to the Union. Likewise the Draft Union Treaty of 9 March 1991 (not yet in force) declares that each Republic party to the Treaty is a sovereign state and that "the USSR is a sovereign federal state formed as a result of a voluntary association of equal

republics and exercising state power within the limits of the powers vested in it by the parties to the Treaty." Part I, I First. Article 5 provides that the republics parties to the treaty "invest" the USSR with specific enumerated powers which may only be changed with the consent of all the republics. Finally, Article 10 of the draft treaty provides that the laws of a republic take precedence on its territory on all questions except those specifically ascribed to the Union's jurisdiction.

(xiv) Venezuela

Article 17, 7, of the Venezuelan Constitution confers upon the states power over "anything which, in conformity with this Constitution, does not pertain to national or municipal jurisdiction."

19. Though there are exceptions (as in the cases of Canada and India), the constitutions of the significant majority of federal States can thus be seen to proceed on the basis that the powers of the central or federal government are derived from the component units; that the

latter retain the residual powers; and that their legal positions cannot be altered without their consent.

20. In the light of contemporary constitutional practice, it is obvious that the current proposals made by the Greek Cypriot Community (as outlined in paragraph 16 above), which strongly suggest that the grant of powers would flow from the federal sovereign to the federated States rather than vice versa, are inconsistent with the historical and factual position of the two communities as separate sovereign entities. Just as the two communities on Cyprus agreed upon the division of governmental powers between themselves in a functional federation under the 1960 Constitution, so, in the formulation of any new federal constitution, it is the two communities which contribute the powers of government and will determine the division of those powers between the federal and the territorial governments.

4. TREATY MAKING BY THE COMPONENT UNITS OF FEDERAL STATES

21. We have also been asked an ancillary question, namely, whether it is in accord with contemporary federal constitutional practice for the component units within federal systems to retain, at any rate in part, the right to carry on relations (including treaty-making) directly with foreign states. The answer is that there is nothing doctrinally impossible about this -- it being simply a matter of inserting appropriate wording in the constitutional arrangements or in subsequently securing appropriate federal authority should this power not previously have been retained.

22. The capacity of the component units of a federal State to conclude treaties was recognized by the International Law Commission of the United Nations in 1962. In the Draft Articles on the Law of Treaties prepared by the Commission in that year, Article 3(2) provided:

In a federal State, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution.

The fact that this provision does not appear in the Vienna Convention on the Law of Treaties as finally adopted cannot be read as suggesting that the Commission eventually concluded that it was wrong in principle. The omission merely reflects a difference of opinion in the Commission as to whether it was necessary to cover this aspect of capacity in a codifying convention.

23. The following are among the principal illustrations:

(1) Federal Republic of Germany

Article 32 of the Basic Law provides that insofar as member States (Lander) are competent to legislate, they may, with the approval of the Federal Government, conclude treaties with foreign States on matters in which the Lander have exclusive or concurrent legislative competence. In the former category of cases the agreements must be approved by

the Federal Government; in the latter category, they need not be. In 1965 a concordat was signed between the Land of Lower Saxony and the Holy See. In 1961 a convention concerning the protection of Lake Constance from pollution was concluded between the land of Wuerttemberg-Baden, the free State of Bavaria, Austria and Switzerland. In addition, Rhineland-Palantinate has concluded three agreements with Luxembourg concerning dams on international rivers and the establishment of a common park.

(ii) Switzerland

Article 9 of the Federal Constitution of 1848 provides that:

> In special cases, the Cantons retain the right of concluding treaties with foreign Powers upon the subjects of public economic regulation. Cross-frontier intercourse, and police relations.

So long as those agreements

shall contain nothing repugnant to the confederation, or to the rights of the other cantons.

A great many such agreements have been made. For example, in 1874 Baden and Basle concluded an agreement providing for the establishment of a ferry and in 1908 Basle-Land and Aargan concluded an agreement with Baden for the establishment of a hydro-electric plant.

Since 1933, there have been seven cantonal agreements with foreign States. These agreements include double taxation treaties between Berne (1935), Neuchatol (1935), Aargau (1939) and France, and between Graubunden (1958) and Schaffhausen (1962) and Liechtenstein, agreements between Basel and the Bank or International Settlements (1932) and Geneva and the United Nations (1946) and an agreement between Schaffhausen and Baden (1947) on the distribution of electric energy.

(111) USA

Article 1, Section 10, clause 3 of the Constitution provides that states may enter into agreements or compacts

with a foreign power with the consent of Congress. Numerous federal laws expressly delegate treaty-making power to the states. See, for example, the United Nations Headquarters Agreement Resolution, 61 Stat. 756 (1947), section 203 of the Federal Civil Defense Act of 1950, 64 Stat. 1245, 1251 (1951); the Northeast Interstate Forest Fire Prevention Compact Act, 66 Stat. 71 (1952); and the International Bridge Act of 1972, 1972 U.S. Code of Cong. & Admin. News 847 (1972).

In addition, the Supreme Court has ruled by implication that a state may make some agreements with foreign governments without the consent of Congress, so long as they do not impinge upon the authority or the foreign relations powers of the United States, Virginia v. Tennessee, 148 U.S. 503, 519 (1893); Cuyler v. Adams, 449 U.S. 433 (1981). Accordingly, an agreement between two North Dakota municipalities acting pursuant to state authority and a Canadian municipality concerning an international drain was upheld by the North Dakota Supreme Court without Congressional approval, because it did not impinge on any federal powers, McHenry County V. Brady, 163 N.W. 540 (1917).

(iv) USSR

On 1 February 1944, the Soviet Union amended its constitution so that each Republic acquired "the right to enter into direct treaty relations with States, to conclude agreements with them, and to exchange diplomatic representatives with them". Subsequently, the Ukrainian S.S.R. and the Byelorussian S.S.A. each became separate Members of the United Nations and parties in their own name to many multilateral conventions. The draft Union Treaty of 11 March 1991 similarly provides:

> The republics are fully-fledged members of the international community. They are entitled to establish direct diplomatic, consular, trade, and other ties with foreign states, exchange official missions with them, conclude international treaties, and participate directly in the activity of international organizations without infringing the interests of the parties to the present treaty and their common interests or violating the USSR's international commitments.

24. Even in Canada, where the Canadian Constitution Act of 1982 places the residuum of power in the federal government and is silent on the treaty-making powers of the provinces, the provinces have in practice concluded -- with the implicit or explicit consent of the federal government -- a considerable number of international agreements both with U.S. states and foreign countries. For example, in 1965 Quebec and France signed an entente on cultural cooperation, to which the Canadian Government gave its consent. In 1970, the Canadian Government consented to the accession of the provinces of New Brunswick and Quebec to the Northeast Interstate Forest Fire Protection Compact along with the states of New Hampshire, Vermont, and Connecticut. T.I.A.S. No. 6825, 21 U.S.T. 415, 753 U.N.T.S. 46 (29 January 1970). Indeed, a 1974 study commissioned by the U.S. Department of State identified over 700 arrangements and agreements of varying degrees of formality concluded between Canadian provinces and U.S. states. See R. Swanson, State/Provincial Interaction: A Study of Relations Between U.S. States and Canadian Provinces (Canus Research Institute, August 1974).

25. It is therefore certainly commonplace under contemporary constitutional practice and not prohibited by

international law for the component units of a federal state to retain and exercise constitutional powers to conclude treaties and international agreements directly with foreign states.

5. SUMMARY

In short, our opinion is as follows:

(i) We consider that by reference to the facts the Turkish Cypriot Community participates in the negotiations with the Greek Cypriot Community as a sovereign entity and on a footing of complete equality. This means, in practical as well as conceptual terms, that the eventual division of powers between the federal government and the governments of the federated states will not represent a grant of powers by the federal government to the federated states nor will it involve any grant of powers by the Greek Cypriot Community to the Turkish Cypriot Community, or vice versa.

(ii) A federal solution which rests upon and acknowledges that the grant of powers is by the federated states to the federal government and that reserves to the

federated states any and all residual powers is in conformity with the predominant constitutional practice in federal systems.

(iii) So also would be an acknowledgement that each of the federated States may, in respect of specified classes of matter, retain the right to make treaties directly with foreign States.

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31 May 1991